

July 2017 Legal Update

Biological Opinions Lawsuits

The Bay Institute, et al. v. Zinke, et al. (Delta Smelt)

On June 29, 2017, The Bay Institute, Natural Resources Defense Council, and Defenders of Wildlife (collectively, “The Bay Institute”) filed a complaint challenging the U.S. Fish and Wildlife Service’s final Biological Opinion regarding the WaterFix project’s effect on Delta Smelt. The complaint alleges that the Fish and Wildlife Service’s finding that WaterFix will neither jeopardize the survival and recovery of the Delta Smelt, nor cause adverse modification of Delta Smelt critical habitat, is contrary to the evidence and relies on unlawful and unsupported assumptions. The Bay Institute claims that the Biological Opinion relies on uncertain and unsupported future mitigation measures, that the Biological Opinion unlawfully fails to consider the effects of the WaterFix action beyond the year 2030, and that the Biological Opinion fails to consider the best available scientific information. The Bay Institute requests that the court find the Biological Opinion to be in violation of the Administrative Procedure Act and order the Secretary of the Interior to withdraw the Biological Opinion and re-initiate Endangered Species Act consultation.

The case is in the United States District Court for the Northern District of California, before Magistrate Sallie Kim. As of this date, the Fish and Wildlife Service has not responded to the complaint, and no hearings have been set. The court is considering an administrative motion by the plaintiffs to relate this case with *Golden Gate Salmon Association*.

Golden Gate Salmon Association, et al. v. Ross, et al. (Chinook salmon)

Also on June 29, the Golden Gate Salmon Association, Natural Resources Defense Council, Defenders of Wildlife, and The Bay Institute (collectively, “Golden Gate Salmon”) filed a complaint challenging the National Marine Fisheries Service’s final Biological Opinion regarding the WaterFix project’s effect on winter-run and spring-run Chinook salmon. This complaint parallels *The Bay Institute* complaint, alleging that the National Marine Fisheries Service’s finding that WaterFix will neither jeopardize the survival and recovery of the Chinook salmon, nor cause adverse modification of designated critical habitat, is contrary to the evidence and relies on unlawful and unsupported assumptions. Golden Gate Salmon claims that the Biological Opinion relies on uncertain and unsupported future mitigation measures, that the Biological Opinion unlawfully fails to consider the effects of the WaterFix action beyond the year 2030, and that the Biological Opinion fails to consider the best available scientific information. Golden Gate Salmon requests that the court find the Biological Opinion to be in violation of the Administrative Procedure Act and order the Secretary of the

Commerce to withdraw the Biological Opinion and re-initiate Endangered Species Act consultation.

This case is also in the Northern District, before Judge Richard Seeborg. As of this date, the National Marine Fisheries Service has not responded to the complaint, and no hearings have been set.

WaterFix DWR Validation Action

California Department of Water Resources v. All Persons Interested in the Matter

On July 21, 2017, the Department of Water Resources filed a “validation action” with the Sacramento County Superior Court, seeking a judgment that the Department is authorized to issue WaterFix revenue bonds to finance the capital costs of the WaterFix project, and confirming the validity of the Department’s July 21, 2017, resolutions adopted in connection with those bonds. The Department also requests that the court enjoin and restrain all persons from instituting any action challenging the Department’s resolutions regarding the revenue bonds, or challenging the bonds themselves. The Department explains that a judgment in this validation action is necessary to provide assurances to the financial community ahead of the sale of any WaterFix bonds. Interested persons may join the validation action to challenge or support the Department’s requests.

This matter has been designated as a complex civil case, with Judge Alan G. Perkins presiding. No parties have responded to date. It remains to be seen to what extent, if any, this action will involve substantive claims on other grounds, including CEQA. We will follow this case closely and report on any updates.

Water Agencies Long-Term Water Transfer Program EIR/EIS lawsuit

AquAlliance et al v. US Bureau of Reclamation, et al

In 2015, the Bureau of Reclamation and the San Luis Delta-Mendota Water Authority approved a final environmental impact statement/environmental impact report (EIS/EIR) for a long-term water transfers program for the sale and delivery of up to 600,000 acre-feet of water from north of the Delta to purchasers south of the Delta. The US Fish and Wildlife Service issued a Biological Opinion and an Incidental Take Statement for the project. AquAlliance, California Sportfishing Alliance, South Delta Water Agency, Central Delta Water Agency, and the Local Agencies of the North Delta filed suit. The plaintiffs allege that the Bureau and the Authority violated the National Environmental Policy Act and the California Environmental Quality Act, respectively, by approving the

EIS/EIR. The plaintiffs also allege that the Biological Opinion and Incidental Take Statement violated the Endangered Species Act.

This case is assigned to Chief Judge Lawrence J. O'Neill and Magistrate Judge Barbara A. McAuliffe, in the Eastern District (Fresno). The parties have briefed and submitted cross-motions for summary judgment without hearing. In July, 2017, Judge O'Neill directed the parties to submit supplemental briefing regarding the baseline treatment of groundwater demand and the incorporation of climate change into the baseline. The supplemental briefs are due September 20, 2017. The Court has indicated that supplemental briefing may be required for additional issues, as the Court's review of the briefs and the record continues.

WaterFix EIR Certification

DWR certified WaterFix EIR on July 21, 2017. 30-day window to file legal challenge closes August 20. No lawsuits to date.